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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

314-666

No. 356

H. S. OLIVER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

No. 357

C. P. SELLERS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HUGH B. WOODWARD,
C. RAY SMITH,
Counsel for Petitioners.

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

I.

That the United States Circuit Court of Appeals for the Tenth Circuit did, on the 9th day of June, 1941, hand down

a decision affirming a conviction of petitioners on a charge of conspiracy to violate the laws of the United States, 18 U. S. C. A. 88 (Sec. 37, Criminal Code), and on, to-wit, the 11th day of July, 1941, your petitioners' consolidated motion for rehearing was denied.

Petitioners were convicted under an indictment which charged that they and twenty-four (24) others named therein did unlawfully and feloniously conspire and devise a cheme for obtaining money and property by false and fraudulent pretenses and representations from numerous persons, including the public generally, for the purchase of oil and gas leases on land owned by the State of New Mexico. It was further charged that it was a part and object of said conspiracy that the mails of the United States would be used for the purpose of carrying it into execution.

Petitioners assigned as error to the Circuit Court:

(1) That there was a fatal variance between indictment and proof in that one large conspiracy was charged and disconnected smaller conspiracies of a different kind were proved—that the proof showed that instead of being conspirators, as charged, the defendants, including petitioners, were, in fact, generally competitors.

(2) That this theory of appellants' defense should properly have been presented to the Jury by adequate requested instructions.

(3) That the trial Court erred in refusing petitioners' request, *in limine*, to apply the "Rule" with respect to the separation of witnesses.

Petitioners would show this Court that the learned Tenth Circuit Court erred in failing to reverse and remand the cases on each of the above points.

Reasons Relied Upon for Allowance of the Writs.

I.

In the humble opinion of counsel for petitioners, on the basis of the three assignments of error to the Circuit Court, *supra,* these cases present to this Court such an outstanding example of a clear abuse of the Conspiracy Statute and such an outstanding example of an unfair trial and clear abuse of the judicial process as to call for an exercise of this Court's power of supervision.

It is submitted that the record clearly shows that the appellants and the other defendants named in the indictment were not conspirators, but were, in fact, competitors; that the only privity between the defendants charged in the indictment was the uncommunicated intention of violation of the same law. Appellants urge that the record shows a gross abuse of the Conspiracy Statute in that all of the defendants named in the indictment were brought to trial at the same time in one trial. That the prosecution was permitted to prove the unrelated frauds of each of the defendants named in the indictment. That with this mass of proof before the jury, it was impossible for the defendants-appellants to obtain a fair and impartial trial and it was impossible for the jury to exclude from its consideration the proof admitted by the trial court which did not, in any way, relate to or affect any action or want of action on the part of the appellants, but which proof was strongly prejudicial to appellants. That said abuse was exaggerated by the failure of the trial court, although requested so to do, to safeguard the appellants by presenting to the jury clear, adequate and proper instructions. That the appellants were further prejudiced by the action of the trial court in permitting the court room, within which the appellants were being tried to be packed with approximately one hun-

dred (100) government witnesses with their friends and sympathizers, all of whom were intensely hostile to appellants and their co-defendants.

The record in this case, counsel submit, presents clearly the type of misuse of the Conspiracy Statute in criminal prosecution so strongly denounced by Mr. Justice Butler in *United States* v. *Motlow,* 10 F. (2d) 657. Yet, such use of the Conspiracy Statute is being made with increasing frequency by the prosecuting attorneys for the United States throughout the Nation.

Here, this Court is respectfully petitioned to exercise its supervisory powers and lay down principles of law and procedure in conspiracy cases to the end that fair and impartial trials may be had and the rights of innocent defendants will not be prejudiced.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit appears at page 168 in the record and is reported in — F. (2d) —.

II.

Statement of Grounds of Jurisdiction.

This Court has jurisdiction under Section 347 of Title 28, U. S. C. A.

III.

Statement of the Case.

The case is stated in the preceding petition and said petition is incorporated by reference herein.

IV.

Specification of Errors.

The learned United States Circuit Court of Appeals for the Tenth Circuit erred in failing to reverse the Trial Court (United States District Court for the District of New Mexico) on each of the following assigned errors:

(1) That there was a fatal variance between indictment and proof in that one large conspiracy was charged and disconnected smaller conspiracies of a different kind were proved—that the proof showed that instead of being conspirators, as charged, the defendants, including petitioners, were, in fact, generally competitors.

(2) That this theory of appellants' defense should properly have been presented to the Jury by adequate requested instructions.

(3) That the trial Court erred in refusing petitioners' request, *in limine*, to apply the "Rule" with respect to the separation of witnesses.

V.

Argument.

(1) The learned Circuit Court erred in failing to reverse on petitioners' first assignment of error.

> That there was a fatal variance between indictment and proof in that one large conspiracy was charged and disconnected smaller conspiracies of a different kind were proved—that the proof showed that instead of being conspirators, as charged, the defendants, including petitioners, were, in fact, generally competitors.

The Circuit Court agreed with petitioners' contention.

> "Variance is fatal where indictment charges one large conspiracy and proof shows two different and disconnected smaller conspiracies, provided defendants substantial rights have been prejudiced."
>
> *Berger* v. *U. S.* (U. S. 1935), 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (rev. C. C. A. 1934), 73 F. (2d) 278.

But the Circuit Court is in error, it is submitted, in its analysis of the facts.

It is stated on page 8 of the opinion below (R. 175):

> "The proof in this cause, however, conclusively shows that all the defendants had a similar general purpose in view—the sale of oil and gas leases on New Mexico lands to the public generally. *Each of the defendants was cooperating in privity with the others toward the same common end.*"

We strenuously assert that there is not one word of testimony in the record upon which the italicized words can rightfully be based. Granting the verity of the first sentence above quoted, we maintain, even though the proof showed a similar general purpose, that is, the sale of New Mexico oil leases to the public generally, that there is no proof in the record showing that each of the defendants was cooperating *in privity* with the others toward the same common end.

To the contrary, the evidence, and all the evidence when taken as a whole, is susceptible of but one conclusion, which is that there was absolutely no privity between the several defendants on trial and there was not one general conspiracy between the defendants on trial and not on trial, but a multitude of smaller, different and disconnected ones, wholly apart and separate and distinct from the others, and without relation each to the other.

Counsel for petitioners would further show the Court that the Record discloses that the defendants were in competition with each other rather than in privity—that they were competitors, not conspirators.

Counsel for petitioners have carefully reviewed this evidence in their motion for rehearing before the Circuit Court (R. 182 to 189, inclusive) and incorporate the same, by reference, in this brief.

(2) The learned Circuit Court erred in failing to reverse on petitioners' second assignment of error:

> That this theory of appellants' defense should properly have been presented to the Jury by adequate requested instructions.

It is submitted that the opinion of the Circuit Court is inaccurate wherein the following statement is made on page 10 of the opinion (R. 177):

> "The instructions *having adequately and correctly covered the applicable law and the facts,* it was not error for the Court to refuse to give requested instructions covered by those given."

We insist, as was insisted in the Court below, that the instructions as given by the trial Judge did not present, to the Jury for its determination, appellants' theory of this phase of the case, in that the Court's general charge did not submit to the Jury the issue as to whether there was one general conspiracy or a series of unrelated and distinct con-

spiracies, which issue would have been fairly submitted had the Court granted the special instructions asked for by the appellants.

We most earnestly urge, that, upon our theory of the law applicable to the facts in this record, the motion for a directed verdict at the conclusion of the Government's case should have been sustained. If, however, the Court does not agree with our contention in this regard, certainly, the law being as declared in the opinion of the Court, there existed a question of fact as to whether or not the proof showed one general conspiracy or a series of individual conspiracies, and in such event, the Trial Court should certainly have given the special instructions as requested, having failed absolutely to present this question of fact to the Jury in its main charge. We earnestly request that the Court carefully examine the Court's general charge, a close perusal of which, we are sure, will convince the Court that our theory of the case was not in anywise presented.

The Court has said in the case of *Little* v. *United States*, C. C. A. 10, 73 F. (2d) 861, that a defendant is entitled to have his theory of the case clearly presented to the Jury. Such being the law, the special instructions should have been submitted.

(3) The learned Circuit Court erred in failing to reverse on petitioners' third assignment of error:

> That the trial Court erred in refusing petitioners' request, in limine, to apply the "Rule" with respect to the separation of witnesses.

The Circuit Court, in its opinion, page 10 and page 11 (R. 177), it is admitted, correctly stated the law in stating:

> "the exclusion of witnesses from the court room while not testifying, is addressed to the trial court's sound discretion."

Nevertheless, it is submitted that sound judicial discretion should not permit the court room to be constantly

packed with one hundred (100) witnesses—their relatives and friends—if the object is to accord defendants a fair and impartial trial.

At the beginning of this trial, we are informed (counsel on this brief not having represented petitioners in the trial Court below) that upwards of one hundred witnesses were called and sworn in by the Government. The record on appeal discloses that some forty or more witnesses actually testified on the trial of this case. Of course, we understand that it is within the discretion of the Court whether or not it will exclude witnesses from the court room during the trial, but we cannot understand, when requested, why the trial court would refuse to invoke the "rule".

Counsel for petitioners represented another defendant at the same term of court, charged with a somewhat similar offense, and we are aware that all of the witnesses who testified in this case were at all times present in the court room —talking among themselves, both in the corridors and in the court room, discussing the testimony of the various witnesses who had testified and who were to testify, among themselves and with the lawyers and other spectators generally—at all times, in the presence of the jury evincing an extreme personal interest in seeing that the defendants on trial were convicted. We contend that the testimony of the witnesses in this case was, of necessity, though perhaps unconsciously, colored as is disclosed by the striking similarity as is reflected in the record. We further contend, that according to the very nature of things and the human equations that obtain, the jury must have been influenced by the intense feeling that permeated the atmosphere of the Court room. To properly present to this Honorable Court the picture in the court below, a moving and talking picture of the proceedings in the Court below would be required. If such a picture could be unfolded before you, we feel sure that you would be able to observe the delight on the faces

of the spectator witnesses, not then testifying, when the prosecution seemingly scored a point or received a favorable ruling at the hand of the Court. Likewise, one could see the sneers and leers that were directed against the defendants and their respective counsel.

We therefore, earnestly request, in order that justice be done and that there might be no question as to the fair and impartial trial that is guaranteed under our Constitution to a defendant whose liberty is at stake, that this Honorable Court hold that to deny to a defendant, under circumstances such as in this case, the right to have the witnesses put under the rule, is an abuse of the Trial Court's discretion allowed him in such matters.

VI.

Conclusion.

Petitioners earnestly maintain that a consideration of the entire record and the errors complained of, conclusively show that petitioners did not receive the fair and impartial trial that is guaranteed to them under the Constitution and Laws of the United States.

WHEREFORE Petitioners pray that this Court grant the writs of certiorari and speak in its supervisory capacity to the end that fair trials may be had.

Respectfully submitted,

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CITATIONS

Cases:

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Galatas v. *United States*, 80 F. (2d) 15, certiorari denied, 297 U. S. 711 — 7

Kopald-Quinn & Co. v. *United States*, 101 F. (2d) 628, certiorari denied, *sub. nom. Ricebaum* v. *United States*, 307 U. S. 628 — 8

Marino v. *United States*, 91 F. (2d) 691, certiorari denied, *sub. nom. Gullo* v. *United States*, 302 U. S. 764 — 7, 8

Martin v. *United States*, 100 F. (2d) 490, certiorari denied, 306 U. S. 649 — 7, 8

Statutes:

Criminal Code (U. S. C., Title 18, Sec. 88), Section 37 — 2

Criminal Code (U. S. C., Title 18, Sec. 338), Section 215 — 3

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 356

H. S. OLIVER, PETITIONER

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THE UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals in both cases (R. 168–178) is reported in 121 F. (2d) 245.[1]

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[1] Petitioners filed separate appeals (R. 33–37, 37–40), but, pursuant to stipulation (R. 165–166), the cases were consolidated and heard together (R. 167–168).

JURISDICTION

The judgment of the Circuit Court of Appeals in each case was entered June 9, 1941 (R. 178). Petitioners' joint motion for rehearing (R. 181–190) was denied July 11, 1941 (R. 191). The petition for writs of certiorari was filed August 7, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether in a prosecution for conspiracy to violate the mail fraud statute the evidence, instead of proving the single large conspiracy charged in the indictment, proved separate smaller conspiracies, and, if so, whether the variance prejudiced the petitioners in their substantial rights.

2. Whether the trial court abused its discretion in failing to exclude witnesses from the court room while not testifying, and, if so, whether petitioners were prejudiced.

STATUTES INVOLVED

Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the

parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 215 of the Criminal Code (U. S. C., Title 18, Sec. 338), insofar as pertinent, provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, * * * in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, * * * or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

The petitioners herein were convicted under Section 37 of the Criminal Code (R. 29) and each sentenced (R. 30–31) to imprisonment for two years

and to pay a fine of $1,000 for conspiring to violate Section 215 of the Criminal Code, known as the mail fraud statute. The court below affirmed the judgments and sentences (R. 178).

The indictment (R. 3–18), which contained one count, charged that from March 9, 1937 to March 14, 1940 the petitioners and 24 other named defendants [2] conspired together and with each other to use the mails in furtherance of a scheme which they had devised to obtain money by selling, through false pretenses and representations, oil leases on lands owned by the State of New Mexico (R. 4–8). The fraudulent means by which the defendants carried out the scheme were set forth at some length (R. 5–8) and nine overt acts in New Mexico were alleged specifically (R. 8–17).

The evidence, so far as here pertinent, shows as follows:

During 1937, 1938, and 1939, the defendant Dorothy Heard was a lease broker actively engaged in purchasing for subsequent assignment leases of so called "open" or "wildcat" lands owned by the State of New Mexico and leased through the State

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[2] Two of these defendants were tried and convicted along with the petitioners (R. 29–30). The case against 9 of the remaining defendants was dismissed (R. 140). Seven of the others pleaded *nolo contendere*, 1 pleaded guilty, 3 appear to be accounted for as aliases of other defendants, 1 was not tried, and 1 appears to be unaccounted for by the record (R. 140–142). Heard, Goss, Aaby, and Dunlap, whose association with the petitioners was especially close, were among the defendants who pleaded *nolo contendere* (R. 140–141).

Land Office (R. 46–47). In February, 1937, being desirous of increasing her business, she arranged a meeting with three lease salesmen at which she asked them to interest other persons in selling leases and stated that high-pressure methods had to be used and that she would be glad to cooperate in sending them literature and in permitting them the use of her mail box in Santa Fe (R. 50–51). One of the salesmen present at the meeting was a man named Standefer, later convicted of violating the mail fraud statute in connection with the sale of New Mexico oil leases (R. 49). Another was the defendant Goss (R. 50, 140).

Subsequent to this meeting and within the period alleged in the indictment Goss and various of the other defendants, including the petitioners, usually working in combinations of two or three, sometimes with Standefer, and often under assumed names, by means of false pretenses and representations, sold lease assignments which were executed by Dorothy Heard and mailed by her to the purchasers (R. 67–68, 78, 87–88, 89–91, 93, 102, 115, 121–122, 123–125, 128–130). Among other combinations, Standefer and Goss (R. 52), Standefer and Goss and the defendant Aaby (R. 52–53), Goss and Aaby (R. 89–91), Goss and petitioner Oliver (R. 52), Goss and petitioner Sellers (R. 97–101), Aaby and petitioner Sellers (R. 87–89, 123–124), and petitioner Oliver and the defendant Dunlap (R. 107, 109, 114–115, 124–126) worked together in making sales.

During the period of the conspiracy each of the petitioners called upon and conversed with Dorothy Heard, as did Goss and Dunlap (R. 80–82), and Dunlap and petitioner Oliver, sometimes with Goss (R. 54), frequently got together with Standefer and "exchanged ideas on the type of *canbass* to work upon people" (R. 130–131). Heard corresponded with various of the defendants and cooperated with them in making sales by providing post office boxes and forwarding their mail giving petitioner Sellers and another defendant letters of introduction (R. 80, 82), and encouraging prospective purchasers to buy (R. 100. See R. 171).[3]

At the trial the court refused petitioners' requested instructions that, in substance, a verdict of not guilty was required if the jury found that there were several separate conspiracies among the defendants instead of the one general conspiracy charged in the indictment (R. 154–155).

ARGUMENT

The petitioners contend (Pet. 3–4) that certiorari should be granted for the reason that the case presents an outstanding example of abuse of the conspiracy statute and of an unfair trial. There

[3] These and other facts supporting the comment of the court below that Heard was "the clearing house for all of the defendants" (R. 171) are shown mainly by documentary evidence which is on file in the court although, pursuant to stipulation (R. 1–2) omitted from the printed transcript of record. See Plaintiff's Exhibits 24, 44–47, 69, 79, 80, 92, 93, 97–99, 101–108, 114–116, 141.

is no merit to this contention and no occasion for further review.

1. The principal claim of petitioners is that there was a fatal variance between the indictment and proof in that the evidence showed "not one general conspiracy between the defendants * * * but a multitude of smaller, different and disconnected ones" (Pet. 7). However, petitioners do not specify even one of this supposed multitude and it is clear from the references cited in the Statement (*supra*, pp. 4–6) that there was evidence from which the jury could have inferred that petitioners, through their connections with Heard, Goss, Standefer, Aaby, and Dunlap, were parties to the conspiracy alleged in the indictment. No formal agreement is necessary to the formation of a conspiracy and a person, to be a member of it, need not know its full extent or membership, it being sufficient that he knows its objects in a general way and participates in their furtherance. *Galatas* v. *United States*, 80 F. (2d) 15, 22–23 (C. C. A. 8), certiorari denied, 297 U. S. 711; *Marino* v. *United States*, 91 F. (2d) 691, 694–696 (C. C. A. 9), certiorari denied *sub. nom. Gullo* v. *United States*, 302 U. S. 764; *Martin* v. *United States*, 100 F. (2d) 490, 495–496 (C. C. A. 10), certiorari denied, 306 U. S. 649.

Moreover, even assuming that the proof did not show the conspiracy charged in the indictment, but separate small conspiracies, the variance would not

be fatal since petitioners were not prejudiced in their substantial rights. *Berger* v. *United States,* 295 U. S. 78, 81–83; *Marino* v. *United States, supra,* 698–699; *Martin* v. *United States, supra,* 494–495; *Kopald-Quinn & Co.* v. *United States,* 101 F. (2d) 628, 633 (C. C. A. 5), certiorari denied, *sub nom. Ricebaum* v. *United States,* 307 U. S. 628. As was pointed out by the Court in the *Berger* case, *supra,* the general rule that allegations and proof must correspond is designed to protect the accused against surprise and against a second prosecution for the same offense. The petitioners make no claim that they were in any way surprised or that the alleged variance exposed them to a second prosecution.

The contention (Pet. 7–8) that it was reversible error for the trial court to have refused petitioners' requested instruction (R. 154–155) that the jury should acquit if it found separate conspiracies is answered by what has been said. The requested instructions assumed that if the alleged variance existed it was fatal, whereas, as above shown, there being no prejudice to petitioners, it was immaterial.

Petitioners' final contention (Pet. 3–4, 8–10) is that they were prejudiced by the refusal of the trial court to exclude Government witnesses from the courtroom while not testifying. However, they cite no record references in connection with this

claim, including none to objections. While it is admittedly difficult to reduce any prejudice of the character asserted to the confines of a printed transcript, this difficulty emphasizes the wisdom of the rule that such matters lie within the discretion of the trial judge. We know of no circumstance which conflicts with the conclusion of the court below that the trial court did not abuse its discretion (R. 177–178).

CONCLUSION

The case was correctly decided below, there exists no conflict of decisions, and there is involved no important question of law. We therefore respectfully submit that the petition for writs of certiorari should be denied.

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